## CHUAH SAY HAI & ORS. v. COLLECTOR OF LAND REVENUE, KUALA LUMPUR

[O.C.J. (Gill J.) February 28, 1967]

[K.L. — Civil Application Nos. 2, 4, 5, 6, 7, 8, 9, 10 & 11 of 1965]

*Land Laws — Compulsory acquisition — Compensation — Award — Objections — Applicants co-owners in undivided shares — Owners to prove inadequency of award — Market value of land — Potentialities — Hypothetical subdivision — Basis of prices — Various interests in land — Land Acquisition Act, 1960, ss. 4 & 38(5).*

These applications were objections referred to the court under section 38 of the Land Acquisition Act against the award of compensation of the Collector of Land Revenue made on December 17, 1964 in respect of the compulsory acquisition by the State Government of 22.763 acres of land of which the applicants were co-owners in undivided shares. The land acquired consisted of seven contiguous lots situated approximately two miles from the centre of Kuala Lumpur town. On the material date the applicant in Civil Application No. 6 of 1965 was owner of an undivided half-share of the land acquired, the other applicants were owners of various undivided shares in the land, making a total of an undivided half-share. Between them they purchased the undivided half-share in November 1963 at $2.20 per sq. foot. In his grounds for the award the collector stated as follows:— "The lands to be acquired are not situated within the commercial centre of the Town but in a comparatively poor residential section. As a whole they are irregular in shape and development would therefore entail considerable loss of land for a comprehensive road system which will be necessary. There are numerous squatters on the lots at the rear and north-west corner. A private developer would therefore have to spend considerable sum in any effort to evict these squatters. This tends to reduce the value of the lands. An undivided share of the lands to be acquired was sold by Delivarayan Chettiar to the present nine co-owners at $2.20 cts. per sq. ft. on 5th November, 1963. The lands to be acquired totalled 22.763 acres. Any prospective buyer of land of this size would inevitably expect a lower price than would be the case if he were to buy a smaller area. Under the circumstances, I value the land at $3 per sq. ft. and award a total compensation of $2,975,190 to be divided amongst the owners according to their respective shares in the lands".

**Held:** (1) where a large area of land is acquired recent sales in the vicinity are the only guides for ascertaining the valuation. The recent sale of the land acquired can be checked with prices paid in the past for similar land in the neighbourhood. In the present case the price paid for land in the immediate vicinity of the land acquired in September 1962 was the best check on the price paid for the acquired land bearing in mind the all-round increase in the price of land over that period;

(2) the land must not be valued as though it had already been built upon. It is the possibilities of the land and not its realised possibilities that must be taken into consideration. The potentialities or possibilities of any land can be measured by the evidence of the prices paid in the neighbourhood for land immediately required for such purposes. Subdividing the land hypothetically into lots and then valuing the land on the basis of the prices which each lot will fetch is not the basis upon which a large piece of land ought to be valued;

(3) where there are various interests in the land under acquisition that require to be valued, the normal method of valuation is that the court should first ascertain the market value of the land as if all separate interests are combined. It should then apportion that value among the different interests;

(4) in this case the principle upon which the collector proceeded to value the land acquired was the correct principle and in arriving at his valuation he had taken into consideration all the circumstances of the case.

*Cases referred to:—*

(1) *Assistant Development Officer, Bombay* v. *Tayabelli Allibhoy Bohori* A.I.R. 1933 Bom. 361, 364.

(2) *Superintendent of Lands and Surveys, Sarawak v. Aik Hoe & Co. Ltd.* [1966] 1 M.L.J. 243, 245, 247.

(3) *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* [1939] A.C. 302.

(4) *Nanyang Manufacturing Co.* v. *The Collector of Land Revenue, Johore* [1954] M.L.J. 69, 71.

(5) *Muhammad Ismail & Ors.* v. *Secretary of State* A.I.R. 1936 Lahore 599.

(6) *Ghulam Hussain* v. *Land Acquisition Officer, Bandra* A.I.R. 1928 P.C. 305.

CIVIL APPLICATION.

*S. D. K. Peddie* for the applicants in applications Nos. 2, 4, 5, 6, 7 & 8 of 1965.

*Ng Ek Teong* (*R. Padmanabhan* with him) for the applicants in application Nos. 9, 10 & 11 of 1965.

*Mohamed Azmi bin Dato' Haji Kamaruddin* (Legal Adviser, Selangor) for the respondent in each case.

*Cur. Adv. Vult.*

**Gill J.:** These applications, which were heard together with the consent of the parties, are objections referred to this court under section 38 of the Land Acquisition Act, 1960 (hereinafter referred to as "the Act") against the award of compensation of the Collector of Land Revenue, Kuala Lumpur in respect of the compulsory acquisition by the Government of the State of Selangor of 22.763 acres (991,730 square feet) of land (hereinafter referred to as "the land acquired") comprised in Certificates of Titles Nos. 9784, 9786 (section 85A), 9785, 9787 (section 79), 10800, 10801 and 14401 (section 47) for Lots 1922, 1928, 1924, 1930, 17, 18 and 19 respectively in the township of Kuala Lumpur, of which the applicants were co-owners in undivided shares. The remaining co-owner was the applicant in Application No. 3 of 1965, which could not be heard together with these applications because he has since died.

The following facts are not in dispute. The land acquired consists of seven contiguous lots and is situated approximately two miles from the centre of Kuala Lumpur town on the north side of Jalan Pekeliling about 200 feet from its junction with Jalan Pahang to the east and about 350 yards from its junction with Jalan Ipoh to the west, with a total frontage of approximately 1,420 feet along Jalan Pekeliling. On the west it is bounded by Sungei Gombak. Immediately

at its rear on the north side are the Tuberculosis Hospital and Clinic and numerous squatters' huts which constitute Kampong Siam. Next to the hospital with road frontage on Jalan Pahang are Lots 29, 56 and 1, and almost directly opposite to Lot 29, across Jalan Pahang, is Lot 2285. To the south of the land acquired, across Jalan Pekeliling, are Lots 95, 96, 97, 98, 12 and 21. All this is shown in the plans which have been put in evidence and marked as P.9 and D.12.

On the material date the applicant in Civil Application No. 6 of 1965, A.K.A.C.T.V. Alagappa Chettiar s/o Sithambaram Chettiar, was the owner of an undivided half-share of the land acquired. The other eight applicants, together with the applicant in Civil Application No. 3 of 1965, were the owners of varous undivided shares in the land, making a total of an undivided half-share. Between them they purchased the undivided half-share from one Delivarayan Chettiar, the previous co-owner with Alagappa Chettiar, on 5th November, 1963 at $2.20 per square foot.

A notification under section 4 of the Land Acquisition Act, 1960 that the land was likely to be acquired was published in the Selangor Government *Gazette* on 4th June, 1964. This was followed by a declaration of intended acquisition under section 8 of the Act which was published in the *Gazette* on 8th October, 1964. Notices on the parties as required by sections 10 and 11 of the Act having been duly served, the collector held an enquiry into claims to compensation for all interests in the land acquired and on 17th December, 1964 made an award of compensation at the rate of $3 per square foot. It is against that award that an objection by each applicant in respect of this undivided interest in the land acquired has been referred to this court.

In his grounds for the award the collector has stated as follows:—

"The lands to be acquired are not situated within the commercial centre of the town but in a comparatively poor residential section. As a whole they are irregular in shape and development would therefore entail considerable loss of land for a comprehensive road system which will be necessary. There are numerous squatters on the lots at the rear and north-west corner. A private developer would therefore have to spend considerable sum in any effort to evict these squatters. This tends to reduce the value of the lands.

An undivided share of the lands to be acquired was sold by Delivarayan Chettiar to the present nine co-owners at $2.20 cts. per sq. ft. on 5th November, 1963.

The lands to be acquired totalled 22.763 acres. Any prospective buyer of land of this size would inevitably expect a lower price than would be the case if he were to buy a smaller area.

Under the circumstances, I value the land at $3 per sq. ft. and award a total compensation of $2,975,190 to be divided amongst the owners according to their respective shares in the lands."

I must state at the outset that in proceedings of this nature it is for the owners of the land acquired to prove that the award was inadequate. As was stated by Broomfield J. in *Assistant Developmet Officer, Bombay* v. *Tayaballi Allibhoy Bohori* [1]:—

"The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand, and if he succeeds in showing *prima facie* that the award is inadequate, then Government must support the award by producing evidence."

It is common ground that the applicants in these proceedings are entitled by way of compensation to the market value of the land acquired as on 4th June 1964, by virtue of section 1(1)(a) and section 2(a) of the First Schedule to the Act. The issue before the court therefore is, what was the market value of the land acquired on that date? As to what "market value" means, Suffian J., in his leading judgment of the Federal Court in the case of *Superintendent of Lands and Surveys, Sarawak* v. *Aik Hoe & Co. Ltd.*,[2] cited with approval the following passage from the judgment of the Privy Council by Lord Romer in *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* [3]:—

"The compensation must be determined . . . by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser . . . it may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its 'market value'. But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at 'the market price'. . . . It is perhaps desirable in this connection to say something about this expression 'the market price'. There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by 'the market value'. . . ."

In the same case Suffian J. cited with approval the following passage from the judgment of Buhagiar J. in *Nanyang Manufacturing Co.* v. *The Collector of Land Revenue, Johore* [4]:—

"I consider that the safest guide to determine the fair market value is evidence of sales of the same land or similar land in the neighbourhood, after making due allowance for all the circumstances."

It is clear from the authorities that where the land acquired was purchased by the owner within a reasonable time of its compulsory acquisition, the price paid affords infinitely the best material for calculating its market value, the

reason being that the elements of dissimilarity will be least present when the transaction sought to be applied is a previous purchase of the same property. The owner, of course, can show that since his purchase there has been an all-round increase in the price of land generally, in which case a proper allowance can be made for such increase. Where there has been no recent sale of the same land, only sales within a reasonable period of lands more or less similarly situated in the same neighbourhood and possessing similar advantages are helpful in determining the market value of any land. As no two lands can be precisely similar in all their circumstances and conditions, a suitable allowance can be made for any differences. No hard and fast rule can be laid down for the allowances to be made in respect of the increase in value of the same land or for the differences between the land acquired and the neighbouring lands, but market value is not required to be calculated with mathematical accuracy and precision. What is required is a fair estimate of market value. It is only in the absence of evidence of recent sales of the same land or lands in the same vicinity that other methods of ascertaining the market value can properly be resorted to. Estimates of value by experts are undoubtedly some evidence, but their value is not great, as expert opinion is liable to err, unless it is supported by, or coincides with other evidence.

As I have already stated, an undivided half share in the land acquired in this case was sold to the applicants by Delivarayan Chettiar at $2.20 per square foot on 5th November, 1963. The applicants have sought to prove that they bought the land cheap because Delivarayan Chettiar was in a hurry to sell. Evidence has been produced that Delivarayan Chettiar was not a permanent resident of Malaya, that he came to this country to collect his assets, that he did not know much about values of land in Malaya, that he wanted to sell his land while he was here so as to avoid paying the capital gains tax in India which he would have to pay if he sold the the land while living there and that he was unable to obtain an extension of his visit pass from the immigration authorities. Three of the applicants have given evidence to say that they bought the land cheap.

It is to be observed, however, that neither Alagappa Chetitar (P.W.1) nor Palaniappa Chettiar (P.W.3) has testified that Delivarayan Chettiar said at any time that he was going to sell the land at any price he could get and go back to India at the earliest possible moment. All that Alagappa Chettiar has said is that he had prepared a plan in 1957 to develop the land, which he discussed with Delivarayan Chettiar who told him that he was not interested in the development of the land and that he wanted to sell it. He was not in the country when Delivarayan Chettiar sold the land, so that he is in no position to say under what circumstances the land was sold. Palaniappa Chettiar has said that Delivarayan Chettiar tried to sell the land, but as his was an undivided share, no one came forward to buy it. He says, however, that he does not know whether $2.20 per square foot was a fair price of the land in November 1963. I have no hesitation whatsoever in saying that I can place no reliance whatsoever on all this evidence which, to my mind, was produced in order to boost the applicants' claim to higher compensation.

There is no evidence that Delivarayan Chettiar was in danger of being deported. He was in this country for at least three years. He became owner of the land in 1962, and he did not sell it until September 1963. He obviously sought the assistance of the members of his community, undoubtedly a community of astute businessmen, to sell his land because it is clear from the evidence that one Kasi Chettiar living as far away as Alor Star recommended the land to one of the applicants, who then communicated with the other applicants. I cannot believe that Delivarayan Chettiar, young though he was, had not the wit to make enquiries as to what the fair market value of the land was before selling it. If the applicants were going to rely on the fact that the land was sold cheap, it was open to them to call Delivarayan Chettiar as a witness or have his evidence taken on commission in India. They thought fit not to do so and are asking the court to say that he sold his land cheap merely because he had no intention of living in this country.

The applicants have next sought to prove that the price paid for the land in November 1963 was substantially below the market value because of the prevailing high prices of land in Kuala Lumpur at that time. Here they rely on the evidence of their expert, Mr. Williams (P.W.4), an estate-agent and valuer, who has produced a report (Exhibit P.8) and given evidence relating to 19 sales of lands in different parts of Kuala Lumpur. The substance of his evidence is that there was a very substantial rise in the prices of lands over the period 1962 to 1964 and that, having considered all the sales which were nearest in point of time, he came to the conclusion that the market value of the land acquired was $12.00 per square foot.

Mr. Williams has agreed that sales 1, 2 and 3 can be ignored and that he places very little emphasis on sales 4, 5 and 6. Sale No. 7 was sale of Lot 2285 in Pahang Road close to the land acquired. The land was 1.437 acres and it was sold at $6.38 per square foot in March 1963. His information was that the land was bought for building 16-storey flats but that up to now the purchasers had not started building. Sale No. 8 was of Lot 1 in Pahang Road, a bit further away from the land acquired, the area being 1.743 acres. This was an unregistered sale and

completion had not taken place up to now. Sale No. 9 was in respect of 1.240 acres of land in the village of Setapak beyond the third mile, Pahang Road in November 1964 at $4.62 per square foot. Sales 10, 11 and 12 were in respect of lands in Ipoh Road at prices ranging from $5.90 to $15.16 per square foot, the higher prices being for small sub-divided lots for terrace houses. Sale No. 13 was in respect of terrace lots off Sentul Road sold in July 1964 at prices varying from $3.90 to $5 per square foot. Sales 14, 15, 16, 17 and 18 were in respect of lands in Imbi Road approximately three miles away from the land acquired. Sale 19 was in respect of terrace lots behind Treacher Road, sold in October 1964 at $21.32 per square foot.

It is to be observed that most of the sales which Mr. Williams took into consideration in arriving at his valuation were sales of lands which could not be said to be lands in the neighbourhood or vicinity of the land acquired. In the nature of things values of lands in any town in the world must vary from one part of the town to another part of the town. What is paid for lands in one sector of the town is no index of what lands in another sector of the town away from it will fetch. The sales which he has considered indicate a rise in the value of lands over the period 1963 to 1964, as he has stated, but they are no index of the market value of the land acquired. The prices paid for such lands, therefore, are wholly irrelevant to the issue in this case, except in so far as they indicate an all-round increase in the value of land generally from year to year. I am therefore of the opinion that such values must be disregarded.

The only sales of lands in the neighbourhood which Mr. Williams considered were sales in respect of Lot 2285 and Lot 1. The sale of Lot 2285 was a sale by a director to his company. It was not a sale in the open market. As Mr. Williams himself was forced to admit, if the sale was by the director to his company, then it would not be a reliable comparison. The so-called sale of Lot No. 1 was not a sale at all. It was an agreement to sell in April 1964 at $7.90 per square foot. A small portion of the agreed purchase price was paid on the date of the agreement and the payment of the balance of the purchase price was subject to the fulfilment of various conditions. There is no knowing when the balance of the purchase price will be paid and there had been no completion of purchase up to the date of hearing. The agreement speaks for itself, so that there is no need for me to go into its details. In my judgment, an agreement such as this cannot be a suitable basis for the valuation of another piece of land in the neighbourhood. Taking the evidence of Mr. Williams as a whole, I am of the opinion that there is no justification whatsoever for his valuing the land at $12 per square foot.

The applicants have sought to make much of the potentialities of the land acquired. In this connection, it is to be observed that a plan for its development as a building site was prepared as far back as 1957. Delivarayan Chettiar knew about the plan. He was therefore aware of the potentialities of the land, and I must assume that so were the purchasers. Indeed, there is evidence that soon after they purchased their respective shares from Delivarayan Chettiar the new purchasers put up a building plan of their own which commended itself to Alagappa Chettiar. This new plan, however, was never submitted for aproval to the appropriate authority, and it is impossible to say that it would have been approved as such. Everybody knew about the potentialities of the land and the land was sold and purchased in November 1963 on that basis. The land was sold and bought as a potential building site and not as waste land or agricultural land. It is clear from the authorities that the land must not be valued as though it had already been built upon. It is the possibilities of the land and not its realised possibilities that must be taken into consideration. The potentialities or possibilities of any land can be measured by the evidence of the prices paid in the neighbourhood for land immediately required for such purposes. Subdividing the land hypothetically into lots and then valuing the land on the basis of the prices which each lot will fetch is not the basis upon which a large piece of land ought to be valued.

It was urged on behalf of the applicants that the market value of property should be determined not necessarily according to its present disposition but laid out in the most lucrative and advantageous way in which the owner could dispose of it. The authority cited for this proposition was the case of *Muhammad Ismail & Ors.* v. *Secretary of State.*[5] That was a case in which it was said that it would not be fair to treat the land in dispute as agricultural land for the purpose of assessment of its market value, as the most lucrative disposition of the property would apparently be to sell or let it for purposes of shops, as there were other shops in the neighbourhood. This is another way of saying that the land must be valued with reference to its potentiality. As I have already stated, this was certainly not a case where the collector treated the land acquired as agricultural land for the purpose of assessing its market value.

The main evidence on behalf of the respondent is the evidence of Mr. Lim Mow Chin (D.W.3), the Government Valuer who, in arriving at his valuation, took the sale of the land acquired itself in November 1963 as the keystone of his valuation. He also took into consideration the sales of Lots 29 and 56 with areas of 2.85 and 3.901 acres respectively on 29th September,

1962 at $1.12 and 65 cents per square foot respectively. These were lands in the immediate vicinity of the land acquired. They were also capable of flat or other types of residential development and were in fact purchased with a view to such development.

It has been contended on behalf of the applicants that the sale of an undivided share is not dependable, as a co-sharer may purchase it at a fancy price of special value to him and purchase by an outsider is often of a speculative value. I do not agree, but I would hasten to add that that may well be so where the sale of an undivided share is the only evidence on which the valuation is to be based. A good deal must also depend upon the extent of the undivided share. Where both the share involved and the consideration are small, neither party may hesitate to make a sacrifice, but where the share involved is large and the land itself is a large piece of land, neither party would be prepared to make any sacrifices. In any event a proper allowance can be made in the case of sales of undivided shares, depending upon whether the purchaser was a co-sharer or a complete outsider. In the present case the purchasers were undoubtedly complete outsiders. There is nothing to suggest that the transaction was not genuine and *bona fide*. Without doubt it was a sale in the open market and the parties were at arm's length. The sale of the land acquired itself in November 1963 was therefore the best evidence of its market value.

Where there are various interests in the land under acquisition that require to be valued, the normal method of valuation is that the court should first ascertain the market value of the land as if all separate interests are combined. It should then apportion that value among the different interests. But the Act does not lay down any hard and fast rule and in special cases it may be desirable to adopt a different method by valuing separately each interest in the land. In the present case there are nine separate applicants. Their applications have been taken together for purposes of convenience, but each applicant is in fact an objector to the award made in respect of his interest in the land acquired. To all intents and purposes each applicant is to be regarded as a willing vendor of his share in the land. The applicant with the highest share is Alagappa Chettiar and he must be regarded as a willing vendor of no greater share in the land acquired than Delivarayan Chettiar who sold his share in November 1963. The undivided shares of the other applicants are comparatively small. I must say, however, that I do not rely on this reasoning as the sole criterion for considering whether the compensation awarded was adequate or otherwise.

As I have stated, the fundamental rule is that when the property under acquisition has been recently purchased, the price paid is *prima facie* the market value thereof. A suitable allowance can be made if the previous sale was of an undivided share, bearing in mind the extent of the share and the parties to whom the land was sold. Where a large area of land is acquired, recent sales in the vicinity are the only guides for ascertaining the valuation. The recent sale of the land acquired can be checked with prices paid in the past for similar land in the neighbourhood. In the present case the price paid for Lot 29 in September 1962 is the best check on the price paid for the land acquired in November 1963, bearing in mind the all-round increase in the price of land over that period. In *Ghulam Hussain* v. *Land Acquisition Officer, Bandra* [6] the Privy Council observed that the sale 14 months previously of land in the neighbourhood with similar advantages was cogent evidence, especially when nothing was shown to have happened which materially affected the value of the land between the date of sale and the Government notification.

As far as this case is concerned, Lot No. 29 was sold at $1.12 per square foot in September 1962 and the land acquired was sold in November 1963, that is, 14 months later, at $2.20 per square foot. There is evidence that during this period of 14 months there had been a rise in the price of land generally. The land acquired is approximately eight times the size of Lot 29 and the price paid for it was almost double the price paid for Lot 29 fourteen months earlier. A bigger piece of land will certainly fetch a lower price than a smaller piece of land in the vicinity. On the basis of the sale price of Lot 29 in September 1962 the sale price of the land acquired in November 1963 was, to my mind, its correct market value, notwithstanding the fact that it was a sale of an undivided half-share. In valuing the land acquired in June 1964 the collector has allowed an increase of approximately 38% over a period of seven months. The value of $3 per square foot reflects not only the general increase in the price of land annually but also a reasonable allowance for the fact that its previous sale was of an undivided half-share.

For the reasons I have stated, I have come to the conclusion that the principle upon which the collector proceeded to value the land acquired was the correct principle and that in arriving at his valuation he has taken into consideration all the circumstances of the case. Paragraphs (b), (c), (d) and (e) of section 2 of the First Schedule to the Act do not apply to this case. As I have stated earlier, it is for the applicants to prove that the compensation awarded to them is inadequate. In my judgment they have failed to discharge that onus. The award made by the collector must therefore stand, and I would dismiss the applications with costs.

I regret to say in conclusion that I have had to disagree with the opinion expressed by

each of the assessors that the compensation awarded was in fact inadequate. The first assessor, Mr. Keith S. Dening, has expressed the opinion that, in the light of the prices prevailing in Imbi Road and other areas for lands suitable for flat development and making suitable allowances, the market value of the land acquired was $4.80 per square foot. The second assessor, Mr. P. M. Varghese, has said that, having regard to the agreed price for Lot 1, the price paid for Lot 2285 and the prices generally for similar land in Kuala Lumpur, he is of the opinion that the market value of the land in question was $6.60 per square foot.

Under section 41(3) of the Act, I direct that each of the assessors be paid a fee of $500.

*Applications dismissed.*

Solicitors: *Skrine & Co.; Braddell & Ramani.*

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## ZENO LTD. v. PREFABRICATED CONSTRUCTION CO. (MALAYA) LTD. & ANOR.

**[O.C.J. (Raja Azlan Shah J.) March 1, 1967]**

**[K.L. — Civil Suit No. 287 of 1964]**

*Companies — Charge on land — Creation of — Failure to register in Land Office — Charge registered with Registrar of Companies — Companies Ordinance, 1940, s. 80.*

*Land Laws — Caveat — Lien — Equitable mortgage — Collateral security for loan — Collusion — Floating security — Land Code (F.M.S. Cap. 138), s. 134.*

The first defendants took a loan of $75,000 from the plaintiffs and executed a mortgage and general charge on February 16, 1962, and as security the defendants deposited with the plaintiffs the title deeds of land in Klang, EMR. 4031 Lot 703, of which they were the registered proprietors. The charge was never registered in the Land Office although it was registered with the Registrar of Companies on March 9, 1962. The plaintiffs lodged a caveat in respect of the said land with the Collector of Land Revenue, Klang, and it was duly recorded in the Register of Document of Title on April 23, 1962. On October 31, 1963 the second defendant obtained judgment for $20,514.87 against the first defendants in a suit and on November 14, 1963 he obtained a prohibitory order against the said land and presented the same to the collector for registration under the provision of the Land Code. The order provided that it was subject to caveats and prohibitory orders. By an order of court dated February 6, 1964 in the same suit the second defendant obtained an order for the sale of the said land by public auction at a reserve price of $25,000. In April 1964 the plaintiffs commenced these proceedings. The first defendants had no other assets and they had not repaid the principal sum of $75,000 nor any interest thereon to the plaintiffs despite a demand for payment made on February 10, 1964. The plaintiffs alleged that they gave notice to the second defendant of their prior lien on the said land but nevertheless the latter proceeded to by-pass their rights and interests in the matter. The plaintiffs sought for judgment in the sum of $82,500 including interest against the first defendants, a declaration that the plaintiffs' lien on the land had priority of right, claim and interest over that of the second defendant's prohibitory order, or order of sale by public auction, alternatively the land be auctioned with a reserve price of $90,000. The first defendants did not enter appearance and judgment by default was entered against them.

**Held:** (1) the charge executed by the first defendants on February 16, 1962 in a favour of the plaintiffs was void for all purposes with the consequence that the money secured thereby became immediately payable;

(2) as the document of title was deposited with the plaintiffs, it was clear that there was the intention to create a lien over the land in accordance with section 123 of the Land Code;

(3) the nature of the plaintiffs' interest in the land was a lien analogous to an equitable mortgage; and an equitable interest in land was capable of being caveated;

(4) the caveat established priority and the onus was therefore on the holder of a subsequent equity to show facts which rendered it inequitable for the holder of a prior equity to insist as against him on that priority. Although priority in time is the ordinary test, in the final analysis where evidence discloses some act or omission on the part of the holder of a prior equity the rule that "who has the better equity" as stated by Parker J. in *Crosbie-Hill* v. *Sayer* (7) applied.

Discussion on floating charge.

*Cases referred to:—*

(1) *Johore Para Rubber Co. Ltd.* v. *Registrar of Companies, Malayan Union* [1948] M.L.J. 135 at 136.

(2) *Selibin Tin Syndicate Ltd.* v. *Registrar of Companies* (1921), 2 F.M.S.L.R. 262.

(3) *Raman Chettiar* v. *Muthiah Chetty* (1923), 3 F.M.S.L.R. 177.

(4) *Palmer* v. *Wiley* (1906), 23 M.N. (N.S.W.) 90, 91.

(5) *Ngan Khong* v. *Bamah* [1935] M.L.J. 167.

(6) *Arunasalam Chetty & Ors.* v. *Peah Ah Poh & Ors.* [1937] M.L.J. 17.

(7) *Crosbie-Hill* v. *Sayer* [1908] 1 Ch. 866, 875.

(8) *Barry* v. *Heider* (1914), 19 C.L.R. 197.

(9) *Great Western Permanent Loans* v. *Friesen* [1925] A.C. 208.

(10) *Abigail* v. *Lapin* [1934] A.C. 491.

(11) *Butler* v. *Fairclough* (1917), 23 C.L.R. 78.

(12) *National Bank of Australasia* v. *United Hand-in-Hand Co.* (1897), 4 App. Cas. 391.

(13) *Woon Poon Hoh* v. *Muthiah Chetty* [1934] M.L.J. 121.

(14) *Murugappa Chetty* v. *Seenivasagam* [1936] M.L.J. 217.

(15) *Gan Khor* v. *Soan bin Pelita* [1935] M.L.J. 158 at p. 159.

(16) *Noble* v. *Noble & Ellis (No. 2)* [1964] 2 W.L.R. 349, 354, 355.

(18) *Government Stock & Ors. Investment Co.* v. *Manila Railway H.L.* (1897), 66 L.J. Ch. 102, 105.

(19) *Biggerstaff* v. *Rowatt's Wharf Ltd.* [1896] 2 Ch. 93.

(20) *Wallace* v. *Avershade* [1899] 1 Ch. 891.

CIVIL SUIT.

*Chooi Mun Sou* for the plaintiffs.

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